

LAMONT TANNER,) 3:13-cv-00435-HDM-VPC
)
Plaintiff,)
) ORDER
vs.)
)
CAROLYN W. COLVIN, Acting)
Commissioner of Social Security,)
)
Defendant.)
)

In this appeal, plaintiff's primary argument is that the ALJ gave insufficient reasons for rejecting the opinion of plaintiff's treating psychiatrist, Dr. VanBiber, that plaintiff is completely unable to work. Dr. VanBiber opined that plaintiff cannot maintain

1 employment due to an inability to deal with criticism and
2 difficulties with being told what to do, new stressful situations
3 and contacts, and feeling confined. Dr. VanBiber believed that any
4 criticism or new stressors would cause plaintiff to significantly
5 decompensate emotionally and become a danger to himself. Dr.
6 VanBiber also believed the ALJ should give weight to the fact
7 plaintiff was receiving disability benefits from Veterans Affairs.¹

8 The ALJ accorded only partial weight to Dr. VanBiber's
9 opinions overall, giving little weight to his opinion that
10 plaintiff is unable to work and that his social limitations are
11 marked. The ALJ found this opinion inconsistent with the objective
12 evidence of record, Dr. VanBiber's own treatment notes, and
13 plaintiff's own reporting of symptoms. The ALJ also noted that Dr.
14 VanBiber seemed to rely uncritically on plaintiff's subjective
15 complaints. In contrast to Dr. VanBiber's opinion that plaintiff
16 had difficulties with new situations and social contacts, with
17 feeling confined and with being told what to do by authority
18 figures, the ALJ found that over the course of five years plaintiff
19 was able to frequently interact and respond appropriately and
20 effectively with numerous physicians and hospital staff, request
21 medication refills, attend appointments, and submit to numerous

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23 ¹ At the time of the ALJ's decision, plaintiff was receiving non-
24 service connected disability from the VA based on a finding that he was 70%
25 disabled due to degenerative joint disease involving the cervical spine,
26 lumbar spine bilateral hips, and right shoulder; metatarsalgia involving
27 both feet; dyspnea on exertion; coronary artery disease; and hypertension.
28 The record does not reflect that the VA found plaintiff disabled in any part
due to mental restrictions. (See AR 249-55). Although the plaintiff had
sought service related disability due to posttraumatic stress disorder
("PTSD"), the VA found no service connected PTSD and did not appear to
consider PTSD as one of plaintiff's disabling factors in granting non-
service connected disability. See *id.*

1 confining diagnostic tests, such as MRIs, all while being described
2 as "pleasant"; that plaintiff responded well to a nurse - a person
3 in a position of authority - when she offered some criticism; and
4 that plaintiff had himself stated that he does not have problems
5 getting along with others, gets along "okay" with authority
6 figures, and has never been laid off from a job because of
7 difficulties interacting appropriately with others. In contrast to
8 Dr. VanBiber's opinion that plaintiff was likely to decompensate
9 significantly if placed in stressful new situations and could pose
10 a danger to himself, the ALJ found that plaintiff consistently
11 underwent unremarkable mental status examinations with no evidence
12 of suicidal ideation, was never labeled a suicidal or homicidal
13 risk, and at times had denied any psychiatric issues at all; that
14 plaintiff had reported medications help "to some degree"; and that
15 plaintiff was generally cooperative.

16 Subsequent to the ALJ's decision, the Appeals Council received
17 additional medical records. (See AR 1-23). The Appeals Council
18 considered some of those records in deciding whether to grant
19 review of the ALJ's decision. (AR 1-6). The records considered by
20 the Appeals Council included a June 18, 2012, progress note
21 documenting plaintiff's first appointment with a new VA
22 psychiatrist, Dr. Maryann Leynes. The note indicated that
23 plaintiff felt Dr. VanBiber's medication regime effectively treated
24 him, and that with the medications he was not depressed and was
25 able to sleep. (AR 1116). Plaintiff reported that his mood was
26 stable and that he had no problems with feeling depressed or
27 irritable; he also denied current concerns regarding anxiety,
28 suicidal and homicidal ideation, and delusions or paranoia. (AR

1 1117). Dr. Leynes observed that the plaintiff was polite and
2 cooperative, his thoughts were linear, logical, and goal directed,
3 and that his insight and judgment were good. (AR 1117).

4 An ALJ's determination of a social security claim must be
5 upheld if (1) it applied the proper legal standard, and (2) there
6 is substantial evidence in the record as a whole to support the
7 decision. *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005);
8 *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996). "Substantial
9 evidence is such relevant evidence as a reasonable mind might
10 accept as adequate to support a conclusion." *Webb*, 433 F.3d at
11 686. It is more than a scintilla but less than a preponderance.
12 *Smolen*, 80 F.3d at 1279. In determining whether substantial
13 evidence exists, the court must consider both evidence that
14 supports and evidence that detracts from the ALJ's conclusion. *Id.*
15 The ALJ's decision must be upheld if the evidence is susceptible of
16 more than one rational interpretation. *Burch v. Barnhart*, 400 F.3d
17 676, 679 (9th Cir. 2005). The ALJ alone is responsible for
18 determining credibility and resolving ambiguities. *Meanel v.*
19 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999).

20 The opinion of a treating physician should be given greater
21 weight than the opinion of examining and nonexamining physicians.
22 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). An ALJ may not
23 reject a treating physician's "opinion without providing 'specific
24 and legitimate reasons' supported by substantial evidence in the
25 record for doing so." *Lester*, 81 F.3d at 830. A treating
26 physician's uncontroverted opinion may be rejected only for clear
27 and convincing reasons. *Magallanes*, 881 F.2d at 751. However, the
28 ALJ may reject "a treating physician's opinion which is 'brief and

1 conclusionary in form with little in the way of clinical findings
2 to support [its] conclusion.'" *Id.* Where a treating physician
3 relies only on the plaintiff's subjective complaints with no
4 objective clinical findings in support, and the ALJ finds the
5 plaintiff to be without credibility, the ALJ may properly reject
6 the treating physician's opinion. *Tonapetyan v. Halter*, 242 F.3d
7 1144, 1149 (9th Cir. 2001). Further, while a treating physician's
8 opinion is entitled to special weight, it is "not necessarily
9 conclusive as to either a physical condition or the ultimate issue
10 of disability." *McAllister v. Sullivan*, 888 F.2d 599, 602 (9th
11 Cir. 1989); *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).
12 The claimant's residual functional capacity is a determination to
13 be made by the ALJ, and not the claimant's physician. *Vertigan v.*
14 *Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001).

15 Evidence submitted after an ALJ's decision becomes part of the
16 administrative record if it relates to the relevant time period and
17 was considered by the Appeals Council in deciding whether to grant
18 review. *Brewes v. Comm'r of Social Sec. Admin.*, 682 F.3d 1157,
19 1159-60, 1162-63 (9th Cir. 2012). Such evidence must be considered
20 by this court when reviewing the Commissioner's decision for
21 substantial evidence. *Id.*

22 The court has considered the pleadings and memoranda of the
23 parties and other relevant matters of record, including the medical
24 records produced subsequent to the ALJ's decision that were
25 considered by the Appeals Council in deciding whether to grant
26 review, and has made a review and determination in accordance with
27 the requirements of 28 U.S.C. § 636 and applicable case law. Good
28 cause appearing, the court hereby **ADOPTS AND ACCEPTS** the report and

1 recommendation of the United States Magistrate Judge (#20).

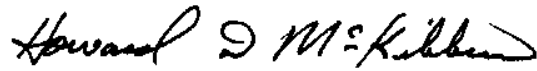
2 The ALJ's stated reasons for rejecting Dr. VanBiber's opinion
3 are supported by substantial evidence. This is particularly true
4 because Dr. VanBiber's opinions as to plaintiff's employability are
5 largely conclusory and unsupported by objective clinical evidence
6 (or even strongly supportive subjective notations), and because
7 conclusions as to employability and residual functional capacity
8 are within the realm of the ALJ, not of the claimant's doctor. See
9 *Batson*, 359 F.3d at 1195; *Vertigan*, 260 F.3d at 1049; *McAllister*,
10 888 F.2d at 602; *Magallanes*, 881 F.2d at 751. The reasons given,
11 when considered alongside the evidence of plaintiff's June 2012
12 psychiatric appointment, which was considered by the Appeals
13 Council, constitute substantial evidence to support the
14 Commissioner's decision.

15 While plaintiff's motion for reversal suggested that the ALJ
16 also erred in not giving great weight to the VA's disability rating
17 in violation of *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th
18 Cir. 2002), plaintiff did not specifically raise this claim in his
19 objections to the magistrate judge's report and recommendation.
20 Nonetheless, the VA's disability rating was not based on any mental
21 impairment - in whole or in part - and instead was based solely on
22 physical impairments. Plaintiff has expressly informed this court
23 - and the briefs are clear - that plaintiff asserts disability on
24 his mental impairments and this appeal relates only to the ALJ's
25 consideration of his mental condition. Accordingly, any
26 deficiencies in the ALJ's opinion regarding the VA rating are
27 irrelevant, as plaintiff is not claiming that he should have been
28 found disabled on the basis of his physical impairments.

1 In accordance with the foregoing, plaintiff's motion for
2 reversal and/or remand (#13) is therefore **DENIED**, and defendant's
3 cross-motion to affirm (#18) is **GRANTED**.

4 IT IS SO ORDERED.

5 DATED: This 30th day of December, 2014.

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8 UNITED STATES DISTRICT JUDGE
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